Supreme Court, U.S.
FILED
SEP 15 1992
OFFICE OF THE CLERK

No. 92-313

IN THE

Supreme Court Of The United States

October Term, 1992

ARTHUR HOFFER, et al.,

Petitioners,

v.

CLASS PLAINTIFFS, et al.,

Respondents,

v.

CITY OF SEATTLE, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Was the U.S. Court of Appeals for the Ninth Circuit correct in ruling that in a federal court class action against over 100 defendants, it is permissible for the class to enter into a settlement with several defendants that includes a release of claims asserted by the exact same class in a state court against the State of Washington, a non-defendant in the federal action, which agreed to contribute $10 million to a $275 million multi-defendant settlement?

2. Was the U.S. Court of Appeals for the Ninth Circuit correct in ruling that a federal district court has the power to approve a class action settlement that releases claims against a party who has been sued by the exact same class in a separate state court action?

3. Was the U.S. Court of Appeals for the Ninth Circuit correct in ruling that the Eleventh Amendment to the U.S. Constitution does not bar a federal district court from approving a settlement releasing claims against a State where the State has waived its Eleventh Amendment immunity for the purpose of participating in the settlement?

4. Was the U.S. Court of Appeals for the Ninth Circuit correct in ruling that approval by a federal district court of a class action settlement releasing the same class's claims pending in a state court does not violate principles of comity and federalism?

5. Was the U.S. Court of Appeals for the Ninth Circuit correct in ruling that approval by a federal district court of a class action settlement releasing the same class's claims pending in a state court, but containing no injunction, does not violate the Anti-Injunction Act, 28 U.S.C. § 2283?

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STATEMENT OF THE CASE

Background of the MDL 551 Litigation

MDL 551, the litigation that gives rise to this Petition, was one of the most complex lawsuits in the history of securities litigation. (A67-68.)[1] The case, which began more than nine years ago, arose out of the nation's largest bond default, the 1983

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[1] The Petition for Writ of Certiorari and the Appendix to the Petition are cited herein as "Pet.____" and "A ____".

default on $2.25 billion in revenue bonds (the "Bonds") issued by the Washington Public Power Supply System ("WPPSS"), which is not an agency of the state of Washington, to finance the construction of two nuclear power plants that were never completed. The settlements that finally ended the litigation—the proceeds of which, with interest, now total almost $900 million—are believed to be the largest ever in a securities class action. It is in the context of this class action, involving well over 100 defendants, with settlement proceeds now totalling almost $900 million, that the Petitioners—six out of approximately 25,000 members of the class—challenge the authority of the District Court to approve one portion of one settlement that brought $275 million to the class, and that resolved the class's claims against numerous defendants and one non-defendant. It is the release by the class of that one non-defendant that is the focus of Petitioners' arguments.

In 1976, WPPSS entered into agreements with 88 public utilities in the Pacific Northwest under which each participating utility ("Participant") purchased a percentage of the project capability of two nuclear power plants being built by WPPSS ("Projects 4/5"). (A3.) Under those agreements, each Participant agreed to pay its percentage share of costs incurred by WPPSS to finance, construct and operate Projects 4/5, including debt service on the Bonds, whether or not the Projects were completed, operable, or operating. (A3.) Over the next five years, WPPSS issued $2.25 billion in Bonds to finance Projects 4/5. (A3.)

On January 22, 1982, construction of Projects 4/5 was terminated with the plants less than 25% complete. (A3.) The Participants would have been obligated to commence payments to WPPSS for debt service on the Bonds one year later. Before the payments became due, however, several actions were filed by ratepayers, certain Participant utilities and Chemical Bank

("Chemical")[2] in its capacity as Trustee and attorney-in-fact for all holders of the Bonds ("Bondholders"). (A4.) These actions sought to contest or enforce the Participants' obligations to make payments to WPPSS under the terms of the Participants' Agreements. On June 15, 1983, the Washington Supreme Court held that certain of the Participant municipal utilities lacked authority to enter into the Participants' Agreements. *Chemical Bank v. Washington Public Power Supply Sys.*, 99 Wash.2d 772, 666 P.2d 329 (1983), *aff'd on reh'g*, 102 Wash.2d 874, 691 P.2d 524 (1984), *cert. denied*, 471 U.S. 1065 (1985). On remand to the State Superior Court, the remaining Participants' Agreements were held to be unenforceable. On appeal, the Washington Supreme Court affirmed, thereby releasing the remaining Participants from their payment obligations. *Chemical Bank v. Washington Public Power Supply Sys.*, 102 Wash. 2d 874, 691 P.2d 524 (1984), *cert. denied*, 471 U.S. 1065 (1985).

In early 1983, numerous class action suits alleging violations of the securities laws in connection with the sale of the Bonds were filed in the Western District of Washington and the Southern District of New York. (A4.) The cases were ultimately consolidated under the caption MDL 551 in the Western District of Washington, and later transferred to the District of Arizona for trial. (A5-A7.) The plaintiffs were (1) representatives of two classes comprising approximately 25,000 persons and institutions ("Class Members") who purchased the Bonds between February 23, 1977 and June 15, 1983, and (2) Chemical as Trustee and attorney-in-fact for all Bondholders. (A4-A5.) There were well over 100 defendants: WPPSS; its directors; the 19 public utilities and four cities that were members of WPPSS, 20 of which were Participants; the 68 Participants that were not members of WPPSS; the individual and alternate members of the Projects 4/5 Participants Committee; the Bonneville Power Administration ("BPA"); Blyth Eastman Paine Webber, the

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[2] A list of subsidiaries (except wholly-owned subsidiaries) of Chemical Banking Corporation, as required by Rule 29.1 of the Supreme Court Rules, is attached as Appendix A. Chemical Banking Corporation does not have a parent company

financial consultant to WPPSS; R.W. Beck & Associates, the consulting engineers to WPPSS; United Engineers and Constructors and Ebasco Services, the architect/engineers for Projects 4/5; two law firms that acted as bond counsel and special counsel to WPPSS; the underwriters of the Bonds; and two securities rating agencies. (A5-A6.)

The MDL 551 litigation, which proceeded for more than five years, was enormous in magnitude and incredibly complex. Multiple rounds of motions to dismiss and for summary judgment raising dozens of statutory and constitutional issues were filed, briefed, argued and decided by the district court. (A6.) Discovery of staggering proportions followed. An estimated 200 million pages of documents were produced. (A6.) Depositions of more than 300 persons were taken over a period of three and one-half years. (A6.) In all, literally thousands of different pleadings, briefs and other court papers were filed in the District Court, and a number of appeals were taken to the Ninth Circuit as well.

After several settlements were reached in the two weeks preceding the commencement of trial, the trial began in Tucson, Arizona on September 7, 1988, in expanded courtroom facilities specially prepared for the trial. (A7, A68.) Seventeen jurors heard opening arguments and testimony until December 1988, when settlement agreements with all remaining defendants were reached and the trial was suspended. (A7.) The jury was dismissed and the trial terminated on January 9, 1989. (A70.)

The *Hoffer* Action Against the State of Washington

In November 1984—20 months after the MDL 551 class actions were commenced—a class action entitled *Hoffer v. State of Washington*, Civil No. 84-2-16459-0 (Sup. Ct. King Co., Wash.) was filed in Washington state court by different attorneys against the State of Washington and certain officials and instrumentalities thereof in connection with the default on the Bonds. (A36.) The class certified in *Hoffer* is *identical* to the MDL 551 Class. (A36.) Petitioners here are the class representatives in *Hoffer*. (A36.) Petitioners had the opportunity to, but chose not to, opt out of the MDL 551 Class.

The *Hoffer* action has remained in the pleading stage throughout virtually the entire duration of MDL 551. (A49-A50.) Little discovery has been conducted in *Hoffer*. (A50.) The merits of the claims in *Hoffer* have not been tested by motion or trial. (A50.) In 1989 by a five to four vote of the Washington State Supreme Court the *Hoffer* claims survived a preliminary Fed. R. Civ. P. 12(b)(6) motion challenging only the sufficiency of the pleadings. No action has been undertaken in *Hoffer* since that date.

The Settlement at Issue

Petitioners challenge the decision of the United States Court of Appeals for the Ninth Circuit affirming the District Court's order approving a consolidated settlement agreement (the "Consolidated Settlement") between the MDL 551 plaintiffs and a group of Participant utilities; the United States on behalf of itself and its agency, BPA; and the State of Washington. (A36-37.) The Consolidated Settlement called for payments by the settling defendants of approximately $275 million, including a $10 million contribution from the State of Washington in exchange for release of Class Members' claims in *Hoffer*. (A38.)

The District Court's Approval of the Settlements

Notice of the settlements and of settlement hearings to be held with respect to whether each of the proposed settlements is fair, reasonable and adequate was provided to Class Members, pursuant to an order of the District Court dated February 6, 1989, through an extensive mail and publication program in accordance with Fed. R. Civ. P. 23. (A7.) In these notices, Class Members were informed of their opportunity to object to the settlements. (A71.) The notices also informed Class Members that the allocation of settlement proceeds would be dealt with by the District Court in the future. (A71.)

Notice of the proposed release of the claims asserted on behalf of Class Members against the State of Washington in *Hoffer* was provided to Class Members in the settlement notice. (A139.) That notice contained a description of the *Hoffer* action, explained that approval of the proposed settlement by the District

Court would mean that "all Class Members shall be deemed to have released the State and its elected and appointed officials[] from any and all liability arising out of occurrences which are the subject of MDL 551 . . . including *Hoffer*", and advised Class Members that "counsel for the Hoffer plaintiffs has taken the position that MDL 551 counsel have no right to settle with the State, and that the $10 million payment by the State in MDL 551 is inadequate." (A139.)

Following the distribution of the notices to Class Members and Bondholders, various papers were filed in the District Court in support of and in opposition to the settlements. (A72.) Counsel for Class Members in the *Hoffer* action ("Hoffer Counsel") filed objections to the settlement between Class Members and the State of Washington, advancing the same arguments now asserted by Petitioners. (A140.) At the April 11, 1989, fairness hearing, the District Court heard from all persons who wished to speak, including extensive argument from Hoffer Counsel of the same points urged in their Petition. (A72, A139-149.)

On September 4, 1989, the District Court approved the settlements in a detailed opinion (reported at 720 F. Supp. 1379; *see* A60-A168), and entered the judgment that is the subject of this Petition. The District Court's order approving the settlements was entered on September 5, 1989, and subsequently amended by Order entered on February 27, 1990, pursuant to Fed. R. Civ. P. 54(b).

Petitioners appealed the District Court's order and judgment to the United States Court of Appeals for the Ninth Circuit. On February 4, 1992, the Court of Appeals affirmed in a detailed opinion (reported at 955 F.2d 1268; *see* A1-A59), which considered and rejected each of the arguments advanced by Petitioners here. Petitioners sought rehearing and suggested rehearing *en banc*. The panel of the Court of Appeals voted to deny the petition for rehearing and to reject the suggestion for rehearing *en banc*. (A175.) No judge of the Court of Appeals requested a vote on the *en banc* suggestion. (A175.)

REASONS FOR DENYING THE WRIT

This case does not present any question worthy of review by this Court. No question of broad application or wide-ranging importance is presented here. The questions presented are extremely fact-specific, arising in the unique context of the extraordinarily complex *WPPSS* litigation, which has now spanned nearly a decade.

The result below is both correct and unremarkable. As the Court of Appeals succinctly summarized: "The plaintiff Class in MDL 551, which is identical to the class in *Hoffer*, simply sought the district court's approval of a settlement that released the State from the claims asserted in *Hoffer*." (A39.) These claims were asserted by MDL 551 Class Members and could be released in any forum chosen by those Class Members. The District Court gave its approval, and the Court of Appeals unanimously affirmed, thereby moving this mammoth litigation closer to final resolution.

Contrary to Petitioners' contention, this case does not present any conflict with any other Court of Appeals decision. A decision by this Court would not offer any substantial guidance to, or resolve any conflicts between, the lower courts. Indeed, the Court of Appeals expressly noted that the precise issue of which Petitioners seek review had never been decided in any reported case. (A37.) That is not surprising, given the unique and fact-specific litigation context in which that issue arose.

Nor do Petitioners contend that the Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10(a). On the contrary, the Ninth Circuit's opinion is well-reasoned and entirely consistent with the authorities most germane to the arcane question presented and, more generally, with the strong judicial policy favoring settlements.

ARGUMENT

I.

THE DISTRICT COURT HAD AUTHORITY TO ENTER AN ORDER SETTLING AND RELEASING THE CLASS'S CLAIMS AGAINST THE STATE.

A. The Decision of the Court of Appeals Is Consistent With Principles Of Class Representation

Petitioners claim that the Court of Appeals erred in ruling that a plaintiff class has authority to settle and release claims against a non-party to the federal class action. There is no support for their contention.

Before turning to the authorities relied on by Petitioners, we emphasize the crucial fact, recognized by the Court of Appeals but ignored by the Petition: "The class in *Hoffer* is *identical* to the MDL 551 Class." (A36; emphasis added.) Thus, the entity releasing the claims against the State through the MDL 551 global settlement is the very same entity which has asserted those claims in state court. Moreover, as the Court of Appeals observed, "the claims asserted against the State in *Hoffer* arise from the same common nucleus of operative fact as those set forth in MDL 551." (A39-A40.)

Petitioners would have the Court pretend that there are two entirely separate and distinct classes, based solely on the fact that there are different class representatives—and different class counsel—in the state court action. But the real party in interest is the *class*, not the class representatives (or their counsel). The six petitioners, like the other Class Members, had the opportunity to opt out of the MDL 551 class and voluntarily chose not to do so. Instead, they elected to be part of the class and to be bound by the collective decisions of the class, subject to the protections of Federal Rule of Civil Procedure 23 and the supervisory powers of the District Court.

The Class Members, through their counsel, decided to release their claims against the State of Washington, in exchange for $10 million, as an integral part of the overall settlement of all of

the claims arising from the WPPSS 4/5 bond default. Petitioners were entitled to challenge the wisdom of that decision—*i.e.*, the fairness, adequacy and reasonableness of the settlement—in federal court. But their contention that the class lacks the authority to settle all of its claims in one proceeding must fail as a matter of law. To rule otherwise would seriously undermine the ability to settle class actions by using all potential sources of recovery. The rule adopted by the Court of Appeals and the District Court is essential to permit settlements to include releases of non-parties as is often necessary to avoid future problems involving claims for contribution or indemnity. That rule is also essential to avoid putting settlements at the mercy of a handful of class members.

Petitioners argue that the Ninth Circuit's ruling conflicts with the Second Circuit's opinion in *National Super Spuds, Inc. v. New York Mercantile Exch.*, 660 F.2d 9 (2d Cir. 1981) ("*Super Spuds*"). The class in *Super Spuds*, however, in order to settle its claims in federal court against the defendants, had agreed to release the different and discrete claims of a *subset* of the class in state court. The Second Circuit set aside the settlement, stressing (a) the lack of a common interest among all federal class members relating to the claims of the subset in state court, *id.* at 17; (b) the "uncompensated sacrifice" of the subset's state court claims for the advantage of the class as a whole, *id.* at 19; and (c) the failure of the notice of settlement fairly to apprise class members (particularly the subset with state court claims) of the terms of the proposed settlement, *id.* at 21.

None of those factors is present in this case. The federal court class and the state court class are *identical*. Thus, all federal class members had exactly the *same* interest with respect to the state court claims released. As the Ninth Circuit properly pointed out in its opinion:

> "MDL 551 Class Counsel who negotiated the Consolidated Settlement represented the exact same group of individuals who make up the *Hoffer* class. . . . Thus, there can be no suggestion that MDL 551 Class Counsel sacrificed the

interests of some members of the class in favor of others." (A47.)

Nor was there any failure here to apprise Class Members of the terms of the proposed settlement, including the release of their claims asserted in *Hoffer*.

Petitioners' reliance on *Dunlop v. Pan American World Airways, Inc.*, 672 F.2d 1044 (2d Cir. 1982), is similarly unpersuasive. *Dunlop* was a federal action brought by the Secretary of Labor against Pan Am, alleging a pattern of age discrimination in violation of the Age Discrimination Act of 1967. While that action was pending in federal court, the individual state claims of certain former Pan Am employees were stayed. After the federal action was settled, because of ambiguous language in the federal settlement agreement, a state administrative agency ruled that the employees' state law claims had been dismissed. The Second Circuit ruled that the federal settlement agreement should be amended to make clear that the employees' state law claims were not barred or otherwise estopped by the federal settlement.

Critical to the Second Circuit's ruling were the facts that (a) "the Secretary had insisted that the federal settlement had no effect on the state claim, and that this was the agreed-upon basis of the settlement", *id.* at 1049; (b) as a matter of federal statutory law, the Secretary had no power to dismiss or extinguish individual state claims, *id.* at 1049 n.7, 1051; (c) the employees "had no say whatsoever about their inclusion in the Secretary's suit", *id.* at 1050; (d) the federal suit was not a representative action and the strictures of Rule 23 did not apply, *id.* at 1049 n.6; and (e) the employees in question did not participate in the federal settlement fund, *id.* at 1048.

Obviously, *Dunlop* is a far cry from the present case. MDL 551 *is* a class action subject to the strictures of Rule 23, and Petitioners voluntarily elected not to opt out of the class. The Class Members, including Petitioners, will all participate in the settlement fund, which is larger than it would otherwise have been because of the release of the Class Members' claims against the State. The settlement agreement expressly releases the claims

against the State, and all Class Members were so notified in advance of the fairness hearing. Finally, there is no statutory bar to such a release. *Dunlop* simply has nothing to do with the present case.

Petitioners' reliance upon *Tate v. Werner*, 393 F. Supp. 1318 (E.D. Pa. 1975), *aff'd*, 538 F.2d 320 (3d Cir.), *aff'd sub nom. Appeal of Zapata*, 538 F.2d 322 (3d Cir. 1976), is also misplaced. In *Tate*, as in *Super Spuds*, the Court deferred decision as to those aspects of the case that were the subject of a class action previously filed, where the plaintiff class was only a *subset* of the class in the previously filed action. *Id.* at 1319.[3]

Finally, Petitioners cite *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979) ("*General Motors*"), as conflicting with the ruling of the Court of Appeals. *General Motors*, however, which was explicitly distinguished by the Court of Appeals (A46-A47) and the District Court (A145), involved an effort by one member of a six member class counsel executive committee to settle the class claims and his client's individual claims simultaneously while excluding remaining class counsel, notwithstanding a court order prohibiting settlement negotiations without the consent of all class counsel. 594 F.2d at 1126. The Seventh Circuit concluded that only portions of the plaintiff class had been represented in the negotiations, raising the concern that the interests of one part of the class might have been sacrificed for the benefit of another part. *Id.* at 1126-29.

No such concerns are present in this case. Class counsel handling the negotiations represented *all* Class Members, and thus by definition all members of the *Hoffer* state court class. (A47.) Thus, because the real party in interest in both federal and state court—the class—is the same, MDL 551 Class Counsel could and

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[3] Petitioners erroneously assert that the "court in *Tate* concluded that the class's claim . . . should not be considered by the federal district court, since the same issue had previously been raised in the state court action." (Pet. 13.) In fact, both proceedings in *Tate* were brought in federal court.

did adequately represent the *Hoffer* class interests, as both the District Court and the Court of Appeals found. (A47, A145.)

Petitioners try to undermine the Court of Appeals' ruling, noting that it "is also necessarily a determination that the Hoffer Class Plaintiffs could have settled *MDL 551* at any time over the objections of the Federal Class Plaintiffs." (Pet. 9.) It is noteworthy that Petitioners suggest such a result should be unthinkable, thereby tacitly admitting that the state court action is a very small tail to the MDL 551 litigation. In any event, it is theoretically true that all the MDL 551 Class Members' claims against all parties *could* have been settled through the vehicle of the state court *Hoffer* action—assuming that, as here, all class members had notice and an opportunity to be heard and that the state court, having heard and considered all objections, concluded that the settlement was fair, reasonable and adequate. The unlikelihood of such a scenario stems not from any legal bar, but from the fact that, given the number of parties and claims involved in MDL 551 and the advanced progress of that litigation—through massive discovery, summary judgment motions and the commencement of trial—as compared to the infancy, after nearly eight years, of the *Hoffer* action, it is hardly likely that such a global settlement could have been achieved in the state court action.

B. The District Court Had Jurisdiction To Enter An Order Releasing The State From The Claims Pending Against It By The Same Class In State Court

1. A Settlement May Release Parties Not Before The Court

The Court of Appeals followed ample authorities holding that "a federal court may release not only those claims alleged in the complaint, but also a claim 'based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented *and might not have been presentable in the class action.*'" (A39, *quoting TBK Partners,*

Ltd. v. Western Union Corp., 675 F.2d 456, 460 (2d Cir. 1982) (emphasis in opinion below).)[4]

While Petitioners concede that proposition, as they must, they assert that the "Ninth Circuit failed to recognize the significance of the State's non-party status." (Pet. 17.) Petitioners' argument is that the District Court's unquestioned power to settle claims beyond the four corners of the complaint does not extend to claims arising out of the *same* facts and asserted by the *same* class against a non-party. Yet Petitioners fail to identify any reason why that should be so, much less any case law adopting the distinction which they urge is so crucial.

Although Petitioners assert that there is some purported "significance of the State's non-party status" (Pet. 17), it is not uncommon for a settlement to release parties that are not actually before the court. For example, corporate defendants in class actions routinely insist that settlements also release all potential claims the class may have against the defendants' corporate affiliates (*e.g.*, parent company or subsidiaries) or their directors, officers and employees, even though they are not defendants. It is, therefore, irrelevant that the State was not a party to MDL 551,

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[4] *See also Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 33-34 (1st Cir. 1991) (state court may approve the release of a federal claim which could not have been brought in the state court); *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 632 n.18 (9th Cir. 1982) ("where a particular type of relief potentially available to the class members is compromised in the settlement process, it is mainly irrelevant whether or not that relief was specifically requested in the complaint. The breadth of negotiations is not necessarily strictly confined by the pleadings"), *cert. denied*, 459 U.S. 1217 (1983); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 221 (5th Cir. 1981) (court "may release not only those claims alleged in the complaint and before the court, but also claims which 'could have been alleged by reason of or in connection with any matter or fact set forth or referred to in' the complaint"), *cert. denied*, 456 U.S. 998 (1982); *Oswald v. McGarr*, 620 F.2d 1190, 1198 (7th Cir. 1980) ("A settlement offer is a compromise and may include a release of claims not before the court.").

especially in light of the fact that the State was a willing participant in the Consolidated Settlement.[5]

None of the three cases cited by Petitioners on this point (Pet. 17-18) has anything to do with the situation here, where all of the releasing and released parties *agreed* to the extinguishment of the claims and voluntarily placed themselves before the District Court for the very purpose of resolving those claims. In *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540 (D. Colo. 1989), nonsettling defendants argued, and the district court agreed, that unasserted claims of nonparties to the action who were not before the court and had not agreed to have their claims extinguished could not be barred. In *Martin v. Wilks*, 490 U.S. 755, *reh'g denied*, 492 U.S. 932 (1989), this Court held that the consent decree at issue could not resolve the conflicting claims of another group of employees who were not before the district court and had not agreed to be bound by the decree. Finally, *Union Carbide Corp. v. Newboles*, 686 F.2d 593 (7th Cir. 1982), did not involve a settlement agreement at all, but rather, a bankruptcy discharge, which "arises by operation of federal bankruptcy law". *Id.* at 595. The bankruptcy law specifically provided that "'[t]he liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt'" and the court had previously held that "the bankruptcy court has no power to discharge the liabilities of a bankrupt's guarantor." *Id. Union Carbide* has no relevance to this case.

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[5] Petitioners stress that different class representatives are involved in the state court action (Pet. 18), but that distinction is meaningless. The consent of the specific representative plaintiffs is not required to settle a class action. *See, e.g., Holden v. Burlington Northern, Inc.*, 665 F. Supp. 1398, 1421-22 (D. Minn. 1987) and cases cited therein; *Manual For Complex Litigation*, Second, § 30.43 at 240 (1985).

2. The Federal Court Had Jurisdiction Over This Case, And Would Have Had Jurisdiction Over The State

a. There Is No Legal Impediment To A State's Waiver Of Its Eleventh Amendment Immunity For The Limited Purposes Of Participating In Settlement Proceedings

Petitioners argue that the District Court lacked jurisdiction to approve the settlement because the State was protected by the Eleventh Amendment. The Court of Appeals recognized (A42), and Petitioners do not dispute, that the State can waive that protection. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 *reh'g denied*, 473 U.S. 926 (1985); *Edelman v. Jordan*, 415 U.S. 651, 673 *reh'g denied*, 416 U.S. 1000 (1974). Petitioners take issue, however, with the conclusion of the Court of Appeals that there is "no legal impediment to a state's waiver of its Eleventh Amendment immunity for the limited purpose of taking part in the settlement proceedings despite otherwise interposing immunity" (A42). Petitioners contend that permitting a State to make such a limited waiver is so "fundamentally unfair" as to require this Court's review. (Pet. 20.)

Petitioners' argument makes no sense. They do not explain why the Eleventh Amendment, written to *protect* states, must be construed to *prevent* the State from taking part in a global settlement, which the State obviously concluded was in its best interest. As the Ninth Circuit correctly pointed out:

> "If we were to adopt a contrary conclusion, states could effectively be forced to refrain from participating in settlement negotiations for fear that they may thereby be waiving their Eleventh Amendment immunity, a result that is inconsistent with the strong judicial policy in favor of settlements." (A42; citations omitted.)

Petitioners' reliance on *Hospital Ass'n of New York State v. Toia*, 435 F. Supp. 819, 827 (S.D.N.Y. 1977), *aff'd*, 577 F.2d 790 (2d Cir. 1978) is misplaced. This is not a situation in which the State has waived immunity and then, having lost, seeks to withdraw its consent to be sued. Rather, at a time when there has

been no ruling on the merits of the claims against it in either federal or state court, the State consented to federal jurisdiction in order to have those claims finally resolved as part of the global settlement. It strains credibility for Petitioners to suggest that this constitutes an abuse of the Eleventh Amendment, or is fundamentally unfair.

Petitioners' citation of *General Motors* lends no support to their argument that the Eleventh Amendment bars the release of Class Members' claims against the State through the federal class action. As Petitioners concede, *General Motors* "did not involve an Eleventh Amendment question." (Pet. 21.) Indeed, *General Motors* has nothing to do with whether the Eleventh Amendment may be waived for purposes of participation in a settlement. The lack of jurisdiction in *General Motors* flowed from the *district court's* discretionary decision not to exercise pendent jurisdiction—a decision that was not the settling party's to "waive". Here, the *State* elected to interpose, as a matter of right, its Eleventh Amendment immunity from suit in federal court, and the State was free to waive that protection for the purpose of settling.[6]

b. The District Court Would Have Had Jurisdiction To Adjudicate A Claim Against The State

Petitioners further contend that the District Court lacked an independent basis of federal subject matter jurisdiction as to the State. (Pet. 22-23.) That is incorrect. Assuming, as does this part of Petitioners' argument, that the State of Washington had waived its Eleventh Amendment immunity, the District Court plainly could have exercised jurisdiction over Class Members' state law claims against the State—the very claims that were released in the settlements approved by the District Court here.

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[6] Moreover, the decision to decline pendent jurisdiction is made not to protect a party, but to promote judicial economy. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966). By contrast, the State's right to interpose immunity from jurisdiction in the federal court under the Eleventh Amendment exists solely to protect the State.

If the State had waived its immunity, the class could have maintained a claim against the State under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b). The District Court would have had subject matter jurisdiction over such a claim, because Section 10(b) claims are within the exclusive jurisdiction of the federal courts. 15 U.S.C. § 78aa. Section 10(b) was amended in 1975 specifically to include "governments" as potential defendants. *See* 15 U.S.C. §78c(9) (definition of "person" under the 1934 Act). Many governments were in fact defendants in MDL 551.

Because the District Court would have had subject matter jurisdiction over a Section 10(b) claim against the State, the District Court also could have exercised pendent jurisdiction over state law claims, including those asserted by Petitioners in *Hoffer*, because they arise from the same "common nucleus of operative fact." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

II.

APPROVAL OF THE SETTLEMENT WITH THE STATE DOES NOT VIOLATE PRINCIPLES OF FEDERALISM OR COMITY.

Petitioners contend that approval of the State's participation in the global settlement violates "basic principles of federalism and comity". (Pet. 24.) According to Petitioners, federalism and comity dictate that the federal court may not exercise jurisdiction over a settlement that includes the State of Washington as a contributor, because the State is a defendant in a pending state court proceeding.

The Court of Appeals properly rejected this argument. (A44.) Principles of federalism and comity simply have nothing to do with this case. What Petitioners conveniently ignore is that the state law claims pending in Washington state court were brought on behalf of the identical class of plaintiffs that was before the District Court in MDL 551. With the State's limited waiver of its Eleventh Amendment immunity, all parties to the settlement were properly and voluntarily before the federal court. Thus, as the Court of Appeals observed: "[T]he district court was presented

with a settlement agreement that, through counsel properly before the court, proposed resolution of claims of persons that also were properly before the court." (A44.) Approval of the Consolidated Settlement in such circumstances "in no way interfered with or intruded into the authority of the Washington state courts." (A44.)

Petitioners argue that the District Court, by entering an order and judgment releasing the State from the claims asserted in *Hoffer*, interfered with the state court's certification order, which directed that it was the only forum for the adjudication or settlement of the class's claims against the State. Petitioners once again seek to obfuscate the fact that the classes in the two proceedings are identical. Both parties in the state court action—the plaintiff class, on the one hand, and the State, on the other—chose to resolve their differences in one court rather than another. The District Court was not engaged in some jurisdictional struggle with the state court. Rather, duly authorized counsel for the MDL 551 Class Members, with the full consent and participation of the State, included the claims of those Class Members asserted in another forum against the State in the resolution of the federal action, where all the other defendants and claims were located, in order to achieve a global settlement. Thus, the situation is analogous to a voluntary removal of an action from state court to federal court, which clearly does not implicate comity or federalism concerns.

The cases upon which Petitioners rely are inapposite. *Tate v. Werner*, as discussed above, involved two *different* classes, and thus raised concerns that are entirely absent here. *Clayton v. Skelly Oil Co.* [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,562 (S.D.N.Y. 1978) (denial of federal class certification), and *In Re Temple*, 851 F.2d 1269 (11th Cir. 1988) (reversal of mandatory class certification) involve entirely different procedural postures from the present case. Nor does this case have anything in common with the jurisdictional dueling between courts of different countries present in *Laker Airways Ltd. v. Pan American World Airways*, 577 F. Supp. 348 (D.D.C. 1983). None of those cases is even remotely analogous to the situation here, where a *settlement* of claims was achieved by *all* the parties to

those claims voluntarily placing themselves before the District Court whose approval of that settlement was sought.

As discussed above, Petitioners concede that a federal court may approve a class settlement releasing claims against the federal defendant that have not been asserted and may not have been assertable in federal court, including such claims that are pending in state court. (Pet. 16.) Petitioners cannot reconcile their admission that such a release of pending state court claims is proper and raises no comity or federalism concerns with their contention that the release by Class Members of pending state court claims against the State of Washington usurps state court authority. The fact that Petitioners are unhappy with one aspect of the global resolution of the claims of Class Members does not mean that the District Court interfered with or offended the state court.

III.

THE ANTI-INJUNCTION ACT DOES NOT BAR APPROVAL OF THE SETTLEMENT.

Finally, Petitioners argue that the District Court's entry of an order releasing the State from the claims asserted in *Hoffer* violates the Anti-Injunction Act, 28 U.S.C. § 2283, and that the decision by the Court of Appeals provides "broad based authority for interference by the federal courts with state proceedings." (Pet. 24.) That is nonsense.

The Court of Appeals correctly concluded that the relitigation exception to the Anti-Injunction Act would permit the District Court to enjoin prosecution of the claims asserted by Class Members against the State in *Hoffer*, and then settled by Class Members in the MDL 551 Consolidated Settlement, in order to protect or effectuate the District Court's judgment in MDL 551. (A43.) This holding was entirely consistent with the decisions from other circuits applying the relitigation exception to orders enjoining litigation of claims that have been settled rather than litigated. *See, e.g., In re Baldwin-United Corp.*, 770 F.2d 328, 335-38 (2d Cir. 1985) (district court approving settlement had authority under All-Writs Act, which Court of Appeals found to

be substantively similar to the "necessary in aid of jurisdiction" exception contained in Anti-Injunction Act, to enjoin State Attorneys General from bringing state court action related to settled federal actions); *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1332, 1335-36 (5th Cir. 1981) (multidistrict court's order enjoining certain plaintiffs in a class action from pursuing lawsuits pending in state court and from pursuing any claims relating to the class action in any court other than certain federal district court did not violate Anti-Injunction Act), *cert. denied*, 456 U.S. 936 (1982); *Brooks v. Barbour Energy Corp.*, 804 F.2d 1144, 1146 (10th Cir. 1986) (relitigation exception to Anti-Injunction Act gave district court jurisdiction to enjoin investors' participation in Oklahoma court lawsuit, which dealt with the same transaction or occurrence that was the subject of the case dismissed with prejudice by district court pursuant to settlement agreement). The decision of the Court of Appeals does not provide authority for interference with litigation; it simply recognizes the parties' rights to settle their claims, rather than continuing to litigate them.

Moreover, the settlement does *not* enjoin the prosecution of *Hoffer*. The Consolidated Settlement enjoins further litigation against "the Settling Defendants", but that term is defined to exclude the State. The State obtained only a release, not an injunction. (A171-A172.)

Petitioners have suggested that the "practical effect" of approval of the settlement was to bar prosecution of *Hoffer*. (A142-A143; Pet. ii.) However, this is true of *any* settlement that extinguishes claims pending simultaneously in federal and state courts. Despite their Anti-Injunction Act rhetoric, Petitioners are simply trying to avoid the *res judicata* effect that this settlement will have on their state court action. If Petitioners were correct, related cases pending in federal and state court could *never* be settled jointly. That is plainly not the law, as the District Court explicitly recognized, holding:

> "Approval of the consolidated Settlement Agreement would, the court recognizes, release Class Plaintiffs' claims against the State of Washington. That is indeed the intent of the

> Agreement. The Anti-Injunction Act is no more a barrier to the Court's approval of this agreement than it would be to any other where further litigation of claims in related actions pending in state courts are circumscribed, through collateral estoppel or *res judicata*, as an outcome of settlement. Such effects are common. The state court action would not be restrained by approval of this Agreement; it would be resolved. The Act is simply not implicated." (A143.)

See also In re Corrugated Container Antritrust Litig., 643 F.2d 195 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982).

Petitioners' discussion of *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988), mischaracterizes the Consolidated Settlement, treating it as if it were tantamount to a dismissal of claims against a plaintiff's wishes, as in *Chick Kam Choo*, rather than an agreement between Class Members, through their counsel, and the State. It is true that the claims were resolved by agreement of the parties, rather than actually being "decided by the federal court" (Pet. 28, quoting *Chick Kam Choo*, 486 U.S. at 147). Thus, Petitioners' argument reduces to the absurd proposition that a resolution reached by a litigated result may be protected from relitigation without offending the Anti-Injunction Act, but a resolution reached through settlement may not. Any such rule would gut the plain power of the district courts to approve and effectuate class action settlements, and would contravene the strong judicial policy in favor of such settlements.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

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September 15, 1992

APPENDIX A

APPENDIX A

The following is a list of subsidiaries (except wholly-owned subsidiaries) of Chemical Banking Corporation, as required by Supreme Court Rule 29.1:

Applied Expert System, Chemical Equity Associates, Battery Ventures L.P., CC Partners L.P., CEA/EEI L.P., Continental Cablevision, Inc. (non-voting), Exeter Capital Advisers, Exeter Capital Limited Partnership, FS Equity Partners I, FS Equity Partners II, Golder, Thoma & Cressey Fund II, Golder, Thoma & Cressey Fund III, Japan/America Venture Partners, Kelso L.P. IV, Lexington Investment (WDKY), McCarthy Outdoor Advertising, MD Investors L.P., MFI, MO Investors L.P., Parker Pen Limited, Schroder German Buy-Out Fund I L.P., Schroder UK Buy Out Fund II L.P., Schroder UK Buy-Out Fund I L.P., Six Flags, Trident, Wedbush & Associates, Wind Point Partners I L.P., Wind Point Partners II L.P., Adva-Lite, Inc., AFCO Industries, Inc., AmeriServ Food Co., Applied Extrusion Tech., Beylik Drilling, Bianchi Holdings, Inc., CEA/CBP LP & Holdings, Co-Optics of America Inc., Cooper Holding Inc., CPP, Inc., DMI Furniture Inc., Domain, Inc., Drilltec, Exhibit Crafts, Inc., Flightline Electronics, Gichner Systems Group, Inc., Hanger Orthopedic Group, In-Store Advertising, J.E. Hanger, Inc., Lexington Investment (WDKY) (non-voting), Lexington Investment (WDKY)-CVCA, Lorvic Companies, The, Lorvic Companies, The (non-voting), Metroplex Holdings, Moebius Printing, Inc., Morningstar Group, Inc., Multimarket Communications Inc., Neimand Industries, New England Book Components, New Horizon Auto Paint, New Mexico Beverage Company, Phoenix Distributors (non-voting), PROXY Message Centers, Inc., PTN Holding Corp., Quality Components, Inc., Red Head Brass, Serigraph, Inc., Serv-Rite Holding Corp., SSM Acquisition Corporation/Serigraph, Superior Holdings, Inc., TA Instruments, Thompson Lacquer Co. (non-voting), TNC Acquisition Corp./Travcorps., TravCorps, Veeco Instrument Group, BAII America, N.V., Compania de Inversiones En Telecommunicaciones S.A., Norchem S.A. Sociedad de

Investimento-Capital Est., Nortel Inversora S.A., CA Venezolana de Cementos, Inversions Pathfinder Chile S.A., Adela Investment Company, S.A., Apartamentos Boulevard S.A., Banco General de Negocios, S.A., Banco Norchem S.A., CB Beteiligungs und Verwaltungsgesellschaft mbh, Frankfurter Wertpapierborse AG, Liquiditats Konsortialbank GmbH, Cedel, S.A., Chemical Asia Limited, FXNET, FXNET Limited, M & C Corporation, The Mitsui Taiyo Kobe Investment Management Co.Ltd., China Capital Partners, Ltd., Creditos Mercantiles del Ecuador, C.A., Far East Bank & Trust Co., Noroeste Chemical S.A. Arrendamento Mercantil, Northwest Iron Co. Ltd., Private Export Funding Corp., Saehan Merchant Banking Corporation, Korea America Financial Services, Inc., San Luis Financial & Investment Co., Ltd., SIFIDA, Sociedad Anonima Escuela Campo Alegre, Landowners L.P., Community Preservation Corporation, Export Credit Ins. Corp. of Singapore, Ltd., Iberica de Descuento, S.A., Intelligent Vision Image System, Inc., Carbonatos do Nordeste S.A., Chemical Finanziaria S.p.A., Banco Chemica (Portugal) S.A., Cedel S.A., Courier Products Limited, Euroclear Clearance System Public Limited Company, Felton Fluid Handling Ltd., Societe Francaise Immob. Loc. Commerce L'Industrie, Daviesyndicate Inc., Deesyndicate Inc., Chemical Securities Asia Limited, Chemical Central Leasing Corp., Manufacturers Hanover International & Cia, Inversions Pathfinder Chile S.A., EIC Corporation Ltd., Amerimex Limited, Desarrollos Turisticos del Pacifico S.A. de C.V., Adela Investment Company, S.A. (MH), Anglo-Romanian Bank Limited, Banco SRL S.A., Banco de Desarrollo Dominicano, S.A., Bank Mendes Gans N.V., Banque de L'Union Haitienne, S.A., Companhia Suzano de Papel e Celulose S.A., Corporation Financiera Columbiana, S.A., D.B. Investments, Inc., Cellulosa de Pacifico S.A., Malaysian Industrial Development Finance, Ltd., P.T. Finconesia, Poliolefinas S.A. Industria E Commercio, Schroder U.K. Buy-Out Fund II USLP 1, SIFIDA (MH), White Knight S.A., Nitroclor Produtos Quimicos S.A. (non-voting), American Ventures Limited, Villamex Limited, Desarrollos Turisticos del Caribe, S.A. de C.V., Propitec Limited, Companice de Inversiones en Telecommunications SA, Leisure Creation Limited, Mexvilla Limited, Aerostat Holdings, L.P. Allied Paper, Apollo Radio, By

Holdings, CBH Holdings, Del Industries, DLTK INC., IK Holdings, Officemart Holdings, Railcar Specialties, United Knitting Acquisition Corp., York Partners, New York Business Development Corporation, P-M-T Limited Partnership, Participants Trust Company, Petroquimica Cuyo (non-voting), Landowners General Partner, Inc., Seinor corporation, Douglas Cablevision IV, L.P., Trinity Cable, Inc., Chemical Venture Partners, Chemical Equity Associates, ARA Holdings, Cone Mills, Northern Group L.P. II, Adler & Chaykin Fund II, L.P., AL-CH Company, L.P., AMC Holdings, Inc. (Non-Voting), American Medical Holdings, Inc., APA Excelsior III (Patricof) L.P., Arcadian Corporation, Blackstone Capital Partners, L.P., Capercaillie (Reading & Bates) (non-voting), Chicago & North Western, Choctaw II Oil & Gas, Ltd., Corporate Partners, L.P. (Lazard), Dr Holdings of Delaware, EC Acquisition (Exide), Ethan Allen, First Reserve Secured Energy Assets Fund L.P., Green Equity Investors, L.P., Green Mountain Holdings, Inc., Kelso ASI Holdings I, L.P., Kelso Investment Associates IV, L.P., Legend Capital Group (Castle Harlan), MFI Furniture Group Ltd. (non-voting), Morgan Stanley Leveraged Equity Fund II, Woodstead Investment Associates, L.P., Recovery Equity Investors, L.P., RHI Entertainment Inc. (Non-Voting), Saratoga Partners II (Dillon Reed), Thomas H. Lee Equity Partners, L.P., Triad Ventures Limited (Non-Voting), Warburg, Pincus Investors, L.P., Whitney Subordinated Debt Fund, L.P., Zellman & Friedman Capital Partners II, Pacifica Associates, Fundamental Brokers Institutional Associates, Liberty Brokerage, Inc., Gulf Stream Aerospace Corporation, Chemical Central Leasing Corp. (2), MH World Trade Corporation Mexico, Massah, S.A. I (non-voting), Massuh, S.A. II, Maxirace Limited, Adler & Shaykin Fund I/MH, Adler & Shaykin Fund II/MH, Alpha & Beta Partners, Bethel Enterprises, L.P., Boston Ventures, L.P., Boston Ventures, L.P. II, Boston Ventures, L.P. III, C&D Private Equity Fund I, C&D Private Equity Fund II, C&D Private Equity Fund III, C&D Private Equity Fund IV, Charterhouse Equity Partners, Corporate Partners - Lazard, Dreman Value Management, L.P., F S Equity Partners II, L.P., First Bershire Fund (TH LEE), Forstman Little Eqty Ptr IV, L.P., GP Acquisition Group, L.P., Hicks Muse Equity Fund, HM/Trident, L.P., HMC Neodata, L.P.,

HMC Partners, L.P., Horticulture L.P., Keller Holding Assoc. L.P., Kelso ASI Holdings, L.P., Kohlberg Investors I, L.P., Kohlberg, Kravis, Roberts – 82 Fnd, Kohlberg, Kravis, Roberts – 86 Fnd, Kohlberg, Kravis, Roberts – 87 Fnd, Mancusco/Equity Partners Fund I, Merrill Lynch Cap. Appr Fnd II, Merrill Lynch Capital Appr Fnd I, Mezzanine Lending Assoc., L.P., New Trend Group, L.P., Riverside Fund I, L.P., Shearson Lehman Hutton, Titan Associates L.P., Trench Associates, L.P., Trivest Institutional Fund, L.P., Venkol Ventures, L.P., Warburg Pincus Cap. Company, L.P., Warburg Pincus Cap. Partners, L.P., Wasserstein, Perella Partners, Wingate Partners, L.P., Z.S. Frankel L.P., Z.S. Colorado L.P., Z.S. Gentry, L.P., Z.S. glasstech, L.P., Z.S.HHL, L.P., Z.S.SED, L.P., Z.S. SUNTV, L.P., Zell/Merrill Lynch Real Est. Ptr, South Andean Investment Company, S.A., The CIT Group Holdings, Inc., CSW Leasing, Inc., New York Equity Fund 1988 Limited Partnership, New York Equity Fund 1989 Limited Partnership, New York Switch Corporation, Argentine Investment Company, Argentine Private Development Trust Company Ltd., Banco Comercial de Uruguay, Chempar Participacoes e Emprendementos Ltd., Compania Sisal do Brazil, Select Capricorn Holdings (Chile) Ltda., Compania de Petroleos de Chile, S.A., BT (Pacific) Limited Y Compania Limitada, Tenedora de Valores del Pacifico Limitada, South Andean Investment Company S.A., Sociedad Mexicana Para La Industria Y El Comercio, Equifin, Cristalerias de Chile, Navarino, Viva Concha y Toro, Reagan National Advertising Inc., S.W.I.F.T., Crow-Southland J.V., SPI-TCB #1 Ltd., Block 67 II Ltd., Block 67 Ltd., Crow-Arlington State J.V., CNB/LIC Investors, Ltd., Lockwood National Bank of Houston, Zell/Merrill Lynch Real Estate Opportunity Partners.

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